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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHN F. "DUFFY" CONLEY and
SHEILA F. SMITH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a search warrant authorizing seizure of all accounting records, all revenue records, all employee records and all evidence "indicative of a gambling operation" violates the particularity requirements of the Warrant Clause and is overbroad.

II. Whether the warrant affidavit provided a substantial basis for a finding of probable cause to enter and search the premises in question.

(a) Whether the court of appeals improperly defined the standard of review to be applied by the district court in reviewing the magistrate's initial probable cause determination.

III. Whether the good faith exception of *United States v. Leon*, 468 U.S. 897 (1984) would apply to save the search and seizure conducted under this warrant.

(a) Whether *Leon* should apply in evaluating the admissibility in federal court of evidence seized by State agents under a State warrant, where the State's highest court has declined to adopt the good faith exception, holding that the less rigorous procedures and practice under State law do not meet the fundamental premises of this Court's opinion in *Leon*.

LIST OF PARTIES

Petitioners John F. "Duffy" Conley and Sheila F. Smith are two of twenty-three defendants charged in a pending federal criminal prosecution docketed at No. 93-3095 in the United States District Court for the Western District of Pennsylvania.

The complete list of defendants in the underlying prosecution is as follows: John F. "Duffy" Conley; William C. Curtin; Sheila F. Smith; John Francis "Jack" Conley; Thomas "Bud" McGrath; Mark A. Abbott; Thomas Rossi; William Steinhart; Roberta Fleagle; Robin Spratt; Monica C. Kail; William J. Reed; Joanne T. Smith; Kenneth "Ron" Goodwin; Lawrence N. "Neudy" Demino, Sr.; Christopher "Chris" Kail; Joseph A. Devita; Frank Garofalo; Thomas D. Ciocco; Michael Sukaly; Phillip M. "Mike" Farrell; Anestos "Naz" Rodites; and William E. Rusin.

The questions presented for review in this Petition relate to a pre-trial motion to suppress evidence. Only three of the twenty-three defendants were found by the district court to have standing on the questions presented: Petitioner John F. "Duffy" Conley; Petitioner Sheila F. Smith and co-defendant John Francis "Jack" Conley.

The district court granted defendants' motion to suppress evidence, and the government appealed the order to the United States Court of Appeals for the Third Circuit. Participating as parties in the court of appeals were Respondent United States of America; Petitioner John F. "Duffy" Conley; Petitioner Sheila F. Smith; and co-defendant John Francis "Jack" Conley.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
I. THE OPINION BELOW UPHOLDING THE VALIDITY OF A WARRANT TO SEIZE ALL BUSINESS RECORDS AND ALL EVIDENCE "INDICATIVE OF A GAMBLING OPERATION" IS IN DIRECT CONFLICT WITH DECISIONS FROM THE SECOND, EIGHTH AND NINTH CIRCUITS	9
II. THE STANDARD OF REVIEW APPLIED BY THE COURT OF APPEALS CREATES A CONFLICT AMONG THE CIRCUITS REGARDING THE PERMISSIBLE SCOPE OF REVIEW OF A MAGISTRATE'S DETERMINATION OF PROBABLE CAUSE	12
III. WHETHER *UNITED STATES v. LEON*, 468 U.S. 897 (1984) SHOULD APPLY IN EVALUATING THE ADMISSIBILITY IN FEDERAL COURT OF EVIDENCE SEIZED BY STATE AGENTS UNDER A STATE WARRANT, WHERE THE STATE'S HIGHEST COURT HAS DECLINED TO ADOPT THE GOOD FAITH EXCEPTION, IS A QUESTION THAT MERITS REVIEW BY THIS COURT	14
CONCLUSION	19

TABLE OF CONTENTS—Continued

APPENDIX: Page

Opinion of the court of appeals 1a
Opinion and Order of the district court 16a
Order denying Petition for Rehearing 47a
Application for Search Warrant 49a

TABLE OF AUTHORITIES

CASES Page

Application of Lafayette Academy, Inc., 610 F.2d 1 (1st Cir. 1979) 10
Center Art Galleries-Haw, Inc. v. United States, 875 F.2d 747 (9th Cir. 1989) 11
Commonwealth v. Bretz, 289 Pa.Super. 259, 433 A.2d 55 (1981) 5
Commonwealth v. Dumont, 370 Pa.Super. 155, 536 A.2d 342 (1987), *app. den.*, 519 Pa. 659 5
Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (1991) 15, 16
Commonwealth v. Hauck, 326 Pa.Super. 461, 474 A.2d 332 (1984) 5
Commonwealth v. Rose, 257 Pa.Super. 514, 390 A.2d 1356 (1978) 5
Commonwealth v. Twelve Dodge City Video Poker Machines, 517 Pa. 363, 537 A.2d 812 (1988) 4
Commonwealth v. Two Electronic Poker Game Machines, 502 Pa. 186, 465 A.2d 973 (1983) 4
Illinois v. Gates, 462 U.S. 213 (1983) 7, 13
Marron v. United States, 275 U.S. 192 (1927) 9
Maryland v. Garrison, 480 U.S. 79 (1987) 9
Smith v. Phillips, 455 U.S. 209 (1982) 7
Thigpen v. Roberts, 468 U.S. 27 (1984) 7
United States v. Abrams, 615 R.2d 541 (1st Cir. 1980) 10
United States v. Conley, 4 F.3d 1200 (3d Cir. 1993) 1
United States v. Conley, 813 F.Supp. 372 (W.D.Pa. 1993) 1
United States v. Craig, 861 F.2d 818 (5th Cir. 1988) 13
United States v. Crozier, 777 F.2d 1376 (9th Cir. 1985) 11
United States v. Fuccillo, 808 F.2d 173 (1st Cir. 1987) 10
United States v. George, 975 F.2d 72 (2d Cir. 1992) 11
United States v. Hove, 848 F.2d 137 (9th Cir. 1988) 13

TABLE OF AUTHORITIES—Continued

Page

United States v. Leary, 846 F.2d 592 (10th Cir. 1988) 10
United States v. LeBron, 729 F.2d 533 (8th Cir. 1984) 11
United States v. Leon, 466 U.S. 897 (1984) ..... *passim*
United States v. Roche, 614 F.2d 6 (1st Cir. 1980) .. 10
United States v. Weber, 923 F.2d 1228 (9th Cir. 1990) 13
United States v. Whitten, 706 F.2d 100 (9th Cir. 1983), *cert. den.*, 465 U.S. 1100 11

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., Amend. IV 2, 9
18 U.S.C. § 1955 ..... 2, 3
18 U.S.C. § 3731 2
28 U.S.C. § 1254(1) 2
18 Pa. C.S. § 5513 ..... 3, 4, 5

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PETITION FOR WRIT OF CERTIORARI

Petitioner Sheila F. Smith respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered on September 16, 1993.

OPINIONS BELOW

The opinion of the court of appeals is reported at *United States v. Conley, et al.*, 4 F.3d 1200 (3d Cir. 1993) and is reproduced in the Appendix, *infra*, at 1a.

The opinion of the district court granting suppression is reported at *United States v. Conley, et al.*, 813 F. Supp. 372 (W.D.Pa. 1993) and is reproduced in the Appendix, *infra*, at 16a.

JURISDICTION

Petitioner was charged by indictment in the United States district court with violating federal criminal statutes. The prosecution remains pending.

The government appealed a pre-trial order suppressing evidence, invoking the jurisdiction of the court of appeals under 18 U.S.C. § 3731. On September 16, 1993 the court of appeals entered its judgment reversing the order of suppression. 1a. A Petition for Rehearing In Banc filed on behalf of John F. "Duffy" Conley and Sheila F. Smith was denied by order entered October 14, 1993. 47a.

The jurisdiction of this Court to review a judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 13.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. § 1955(a), (b)

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

18 Pa.C.S. § 5513(a)(1)

(a) Offense defined.—A person is guilty of a misdemeanor of the first degree if he:

(1) intentionally or knowingly makes, assembles, sets up, maintains, sells, lends, leases, gives away, or offers for sale, loan, lease or gift, any punch board, drawing card, slot machine or any device to be used for gambling purposes, except playing cards.

STATEMENT OF THE CASE

Petitioners are two of twenty-three defendants charged in a pending federal criminal prosecution with gambling offenses related to the operation of a vending company whose inventory included video poker machines. Petitioners are also charged with money laundering offenses for having allegedly deposited proceeds from the vending business into banking institutions.

Under 18 U.S.C. § 1955 it is a federal criminal offense to operate a gambling business which involves five or more

persons and is in violation of the law of the State or political subdivision in which it is conducted. Here, the predicate violation of State law is charged under section 5513 of the Pennsylvania Crimes Code. 18 Pa.C.S. § 5513. Under section 5513(a)(1) of the Code it is unlawful knowingly to sell, lease or maintain a "gambling device".

The investigation that resulted in this federal prosecution was begun by the City of Pittsburgh Police Department. The evidence suppressed by the district court had been seized under a search warrant issued by a state district justice to a city police officer on September 23, 1988.

On that date City Detective John Bosetti presented a search warrant application and affidavit of probable cause to District Justice Anne Marie Sharding. The Bosetti affidavit is reproduced in the Appendix to this Petition at 49a. The warrant application identified the crime under investigation as a violation of 18 Pa.C.S. § 5513, "Gambling devices, gambling, etc.", involving the maintenance and/or use of video poker machines.

Video poker machines are not categorically prohibited gambling devices under Pennsylvania law. Construing the forfeiture provisions of 18 Pa.C.S. § 5513(b), the Pennsylvania Supreme Court has held that only video poker machines equipped with "knock-off" switches, which facilitate gambling by allowing accumulated credits to be removed from the board, are forfeitable as *per se* gambling devices under section 5513(b). *Commonwealth v. Twelve Dodge City Video Poker Machines,* 517 Pa. 363, 537 A.2d 812, 814 (1988) (machines without knock-off switches were not gambling devices under section 5513, even though machines could have been converted to include those features in approximately 15 seconds); *Commonwealth v. Two Electronic Poker Game Machines,* 502 Pa. 186, 465 A.2d 973, 979 (1983) (no forfeiture of machines under section 5513 in absence of knock-off switch).

An otherwise legitimate amusement device can also be a gambling device under section 5513(a)(1) if it is used as the medium for gambling activity. Under Pennsylvania law the only benefit a player is permitted to receive for accumulated credits won on a video game machine is extended play. If a location owner instead pays the player cash for accumulated credits, the machine is forfeitable as a gambling device, whether or not it is a gambling device *per se*. *Commonwealth v. Hauck*, 326 Pa.Super. 461, 474 A.2d 332, 333 (1984). Under this theory of prosecution, a PacMan or a checkers board could qualify as a gambling device, depending on the manner in which the game is used.

The offense defined by section 5513(a)(1) is a specific intent crime, which requires a showing of intent that the machine was provided and/or maintained with the knowledge and intent that it be used for unlawful gambling purposes. *Commonwealth v. Dumont*, 370 Pa.Super. 155, 536 A.2d 342, 349 (1987), *app. den.*, 519 Pa. 659; *Commonwealth v. Rose*, 257 Pa.Super. 514, 390 A.2d 1356 (1978); *Commonwealth v. Bretz*, 289 Pa.Super. 259, 433 A.2d 55, 58 (1981).

The Bosetti affidavit averred that Pittsburgh police officers visited 50 businesses in the City of Pittsburgh that maintained video poker machines on the premises; that at 49 of these locations, officers observed players receive cash pay-offs from owners or employees of the business for accumulated credits on the machines; that vending licenses displayed at 42 of the locations listed Duffy's Vending as the owner of the machines; and that license applications filed by Duffy's Vending with a city regulatory agency listed a business address of 930 Saw Mill Run Boulevard. 49a-50a.

Bosetti's affidavit concluded with the request that a warrant to search 930 Saw Mill Run Boulevard "be issued in an effort to gain a better insight into the internal works of this gambling operation." 50a.

The district court concluded that the affidavit did not provide probable cause to search 930 Saw Mill Run Boulevard. The district court's findings included the following:

> 66. There is no basis for concluding that Duffy Conley, Duffy Vending Co. or any employee thereof knew or intended that Duffy Vending Co. video poker machines would be used as illegal gambling devices at any of the 42 locations that paid off on Duffy Vending Co. machines.
>
> 67. There is no basis for concluding that the Duffy Vending Co. video poker machines in place at forty-two of the forty-nine pay-off locations were illegal gambling devices per se.
>
> 68. The District Justice had no substantial basis for concluding that Duffy Conley, Duffy Vending Co. or any of his/its employees were violating Section 5513.
>
> 69. The District Justice had no substantial basis for concluding that evidence of a Section 5513 violation could be found on the premises of 930 Saw Mill Run Boulevard.

31a.

Having found that the warrant was not supported by probable cause, the district court went on to find that the affidavit was so facially deficient as to preclude objectively reasonable reliance on the warrant as a valid instrument of power to search. The search and seizure could not, therefore, be sanitized under the good faith exception of *United States v. Leon*, 466 U.S. 897 (1984).

Petitioners also argued before the district court that the warrant violated constitutional requisites of particularity and was overbroad. The warrant authorized law enforcement agents to search for and to seize the following:

> All video poker machines, keys for machines, accounting records, all revenue records, employee rec-

> ords, purchase orders from distributors and manufacturers of video poker machines, all records showing poker machine locations and any and all paraphenalia indicative of a gambling operation.

Because the district court invalidated the warrant on other grounds, it did not address the issue of overbreadth in its memorandum opinion.

The issue of overbreadth was raised by Petitioners before the court of appeals as an alternative ground for affirming the suppression order, citing *Thigpen v. Roberts,* 468 U.S. 27, 29-30 (1984) (court of appeals may affirm the result below on any ground that the law and the record permit, even if for reasons other than those cited by the district court) and *Smith v. Phillips,* 455 U.S. 209 (1982) (same).

The court of appeals reversed the district court. On the issue of probable cause, the court of appeals held that the district court had "applied an unduly narrow standard for evaluating probable cause". 2a. In *Illinois v. Gates,* 462 U.S. 213, 238 (1983) this Court held that the standard of review to be applied by the court is not *de novo.* Under *Gates* the duty of the reviewing court is to determine whether the magistrate had a substantial factual basis for concluding that probable cause existed.

The court of appeals took issue with the standard of review applied by the district court, as follows:

> The district court noted at length facts which the affidavit does not contain and, based on these omissions, determined that the affidavit did not support a finding of probable cause. By listing information the affidavit did not explicitly state, and focusing on these omissions, the district court essentially conducted a *de novo* review, which is not countenanced under *Gates.*

13a.

In concluding that the affidavit did provide a substantial factual basis for probable cause to search 930 Saw Mill Run Boulevard, the court of appeals applied the following logic:

> Of forty-nine locations where the machines were being used for illegal purposes, forty-two of them involved use of the machines owned by Duffy Vending Co. Because it is illegal to lease or sell machines knowing that they will be used for gambling, probable cause existed to believe that the lessor or vendor of the machines was involved in the gambling operations, and that evidence of this illegality would be present at the location of the lessor or vendor of the machines.

10a. The court of appeals identified no factual basis in the affidavit for concluding that Duffy Vending, as the lessor of the machines, had knowledge that the machines were being used for unlawful gambling purposes.

On the issue of overbreadth, the court of appeals held as follows:

> Read as a whole, the search warrant allows the seizure of items indicative of an illegal gambling operation. Since the warrant limits the search to items related to an illegal gambling operation, there is sufficient specificity, satisfying the particularity requirement of the Fourth Amendment.

14a.

A Petition for Rehearing filed on behalf of Petitioners John F. "Duffy" Conley and Sheila F. Smith was denied by Order entered October 14, 1993. 47a.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW UPHOLDING THE VALIDITY OF A WARRANT TO SEIZE ALL BUSINESS RECORDS AND ALL EVIDENCE "INDICATIVE OF A GAMBLING OPERATION" IS IN DIRECT CONFLICT WITH DECISIONS FROM THE SECOND, EIGHTH AND NINTH CIRCUITS.

The Fourth Amendment directs that, "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This Court has previously held that in order to satisfy constitutional requisites, the warrant must provide sufficient particularity that the executing officer is left with no discretion to decide what may be searched for and seized. *Marron v. United States,* 275 U.S. 192, 196 (1927).

In *Maryland v. Garrison,* 480 U.S. 79, 84 (1987) this Court defined the constitutional imperative of the Warrant Clause in the following terms:

> The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one 'particularly describing the place to be searched and the persons or things to be seized.' The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, *the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.*

(Emphasis added.)

The warrant for 930 Saw Mill Run Boulevard gave law enforcement agents authority to search for and to seize *all* accounting records, *all* revenue records, *all* employee records, and *all* evidence 'indicative of a gambling

operation". Acting under the warrant's essentially unrestricted grant of authority, executing agents in fact seized every piece of paper found in the offices occupied by Duffy Vending Co. Nothing was left behind.

The warrant is overbroad, in that it authorizes seizure of items for which there is no probable cause. It also violates the particularity requirements of the Warrant Clause in failing to provide reasonable guidance to the executing officers regarding those items lawfully subject to seizure under the warrant.

The constitutional defects in the warrant may generally be broken down into two categories: (1) the "all records" category, which covers the warrant's grant of authority to seize all machines, all lists, all records, etc.; and (2) the "all evidence" category, which covers the grant of authority to search for and seize all evidence "indicative of a gambling operation".

The First and Tenth Circuits have considered "all records" warrants and have reached conclusions that directly conflict with the opinion of the Third Circuit in this case.

See, United States v. Leary, 846 F.2d 592, 601-605 (10th Cir. 1988) (warrant for "all records" maintained under arms export control regulations and "all documents relating to violation of arms export control act" overbroad); *United States v. Fuccillo*, 808 F.2d 173, 176 (1st Cir. 1987) (warrant for "all" cartons of merchandise overbroad); *United States v. Abrams*, 615 F.2d 541, 543 (1st Cir. 1980) (warrant authorizing seizure of all patient records insufficiently particular); *Application of Lafayette Academy, Inc.*, 610 F.2d 1, 3-4 (1st Cir. 1979) (warrant "framed to allow seizure of most every sort of book or paper at the described premises, limited only by the qualification that the seized item be evidence of a violation of [federal law]" overbroad); *United States v. Roche*, 614 F.2d 6, 7 (1st Cir. 1980) (warrant authorizing search for all insurance records overbroad).

The warrant also violates the particularity requirements of the Warrant Clause in failing to provide reasonable guidance to the executing officers regarding those items lawfully subject to seizure under the warrant. This defect is apparent in the warrant's grant of authority to search for and seize "all evidence" of gambling activity.

The opinion of the court of appeals explicitly approved the "all evidence" provision of the warrant, as follows:

> Read as a whole, the search warrant allows the seizure of items indicative of an illegal gambling operation. Since the warrant limits the search to items related to an illegal gambling operation, there is sufficient specificity, satisfying the particularity requirement of the Fourth Amendment.

14a.

This opinion puts the Third Circuit directly in conflict with the Second, Eighth and Ninth Circuits regarding the constitutional validity of "all evidence" warrants.

See, United States v. George, 975 F.2d 72, 75-77 (2d Cir. 1992) (warrant authorizing search for "other evidence relating to the commission of a crime" overbroad); *Center Art Galleries-Haw, Inc. v. United States*, 875 F.2d 747, 752-54 (9th Cir. 1989) (warrant authorizing search for documents comprising evidence of federal crime, "including, but not limited to" listed items, overbroad); *United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir. 1985) (warrant authorizing search for "material evidence of a violation of 21 U.S.C. 841" overbroad); *United States v. LeBron*, 729 F.2d 533, 536 (8th Cir. 1984) (warrant authorizing seizure of "other property believed to be stolen" did not "provide reasonable guidance for the exercise of informed discretion"); *United States v. Whitten*, 706 F.2d 100, 1014-15 (9th Cir. 1983), *cert. den.*, 465 U.S. 1100 (warrant authorizing search for "evidence of narcotics trafficking" not sufficiently particular).

The opinion of the court of appeals, finding no constitutional defect in this warrant's grant of authority to search for and to seize all accounting records, all revenue records, all purchase orders, all employee records, and all evidence "indicative of a gambling operation", is in direct conflict with precedent from this Court and with decisions from the Second, Eighth and Ninth Circuits.

Petitioners therefore respectfully request that a writ of certiorari issue to review the opinion of the court of appeals.

II. THE STANDARD OF REVIEW APPLIED BY THE COURT OF APPEALS CREATES A CONFLICT AMONG THE CIRCUITS REGARDING THE PERMISSIBLE SCOPE OF REVIEW OF A MAGISTRATE'S DETERMINATION OF PROBABLE CAUSE.

The activity described in the Bosetti affidavit of probable cause is the use of legitimate amusement devices for gambling purposes by third parties having no demonstrated connection to Duffy's Vending. As the district court noted, there is no information in the affidavit connecting Duffy's Vending to the use of these machines for gambling purposes in June of 1988.

The district court found that the affidavit provided no factual basis for belief that Duffy's Vending, or John Duffy Conley, or any person acting on behalf of either Duffy's Vending or John Duffy Conley, was involved in the pay-offs or had any awareness that such pay-offs had been made. There is nothing to indicate that Conley and/or Duffy's Vending knew that the machines were being used for gambling purposes at the time the warrant issued. There is less than nothing to indicate that they provided or maintained the machines with the specific intent that they be used for such unlawful purposes.

Nor is not possible to infer the requisite knowledge and intent from the character of the machines themselves.

There is nothing in the affidavit indicating that any of the machines were equipped with knock-off switches or similar devices to facilitate their use for gambling purposes.

To say that this affidavit provides probable cause to search 930 Saw Mill Run Boulevard is to say that reports of fifty-cent wagers on checkers games would provide probable cause to search the corporate offices of Mattel.

The court of appeals held that the district court applied an improper standard of review by considering the *absence* of information connecting Duffy's Vending to the observed gambling activity. The court of appeals held that by discussing what was *not* in the affidavit, the district court was essentially undertaking a *de novo* review, in violation of this Court's opinion in *Illinois v. Gates,* 462 U.S. 213 (1983).

The court of appeals' opinion misapplies *Gates;* transgresses common sense; and creates a direct conflict with circuits that have held that the scope of review extends to consideration of what is not in an affidavit of probable cause.

In concluding that a warrant issued by a federal magistrate was not adequately supported by probable cause, the court of appeals in *United States v. Weber,* 923 F.2d 1228 (9th Cir. 1990) explicitly relied on what was not in the affidavit of probable cause, including the absence of information regarding the target's personal involvement in the crime under investigation. Similarly, in *United States v. Craig,* 861 F.2d 818, 821 (5th Cir. 1988) the court of appeals held that the first duty of a reviewing court is, "to examine the affidavit, looking to see what it did, and did not establish regarding [the defendant's] activities." In ordering the suppression of evidence in *United States v. Hove,* 848 F.2d 137, 139-140 (9th Cir. 1988), the court of appeals similarly noted the absence of particularized information regarding the place to be searched.

In holding to the contrary, the Third Circuit puts itself in conflict with both the Fifth and the Ninth Circuits regarding the applicable standard of review.

The best Detective Bosetti could do in this case was to tell the district justice that he needed a search warrant in order "to gain a better insight" into the Conley business. This was a fishing expedition, pure and simple. For a federal court of appeals effectively to sanction such procedure by distorting the applicable standard of review violates principles of constitutional jurisprudence that have been recognized and enforced by this Court for over a century.

Petitioners therefore respectfully request that a writ of certiorari issue to review the decision below.

III. WHETHER *UNITED STATES v. LEON*, 468 U.S. 897 (1984) SHOULD APPLY IN EVALUATING THE ADMISSIBILITY IN FEDERAL COURT OF EVIDENCE SEIZED BY STATE AGENTS UNDER A STATE WARRANT, WHERE THE STATE'S HIGHEST COURT HAS DECLINED TO ADOPT THE GOOD FAITH EXCEPTION, IS A QUESTION THAT MERITS REVIEW BY THIS COURT.

This case would provide the Court with an excellent record for reviewing the implications of applying the good faith exception to a state warrant issued under vastly different policies and procedures than those presented to the Court in *United States v. Leon*, 468 U.S. 897 (1984).

At the core of the good faith exception under federal law is the principal that law enforcement agents should be entitled to rely on the judgment of the issuing magistrate regarding the validity of the search warrant. *United States v. Leon, supra.*

The distinctions between federal and state warrant practice begin with the qualifications of the issuing authority.

Under federal law the issuing magistrate is required to be a lawyer with at least five years' experience in the practice of law. 28 U.S.C. § 631(b). That is not the case under Pennsylvania law. Under Pennsylvania law the only qualification for the elected post of district justice is that the candidates have resided within the magisterial district for one year. Pennsylvania Constitution, Art. V, § 12; 42 Pa.C.S. § 3101(a). There are no educational requirements; no minimum age requirements; and no requirements related to work experience. After election, forty hours' instruction is provided covering all aspects of civil and criminal law, "including evidence and procedure, summary proceedings, motor vehicles and courses in judicial ethics." 42 Pa.C.S. 3113.

Anne Marie Scharding, the district justice who issued the warrant in question, had been a secretary in the same office prior to her election as district justice.

As noted, one of the fundamental premises of *Leon* is that a law enforcement agent should be able to rely on the presumably greater knowledge and more educated judgment of the issuing authority in executing a search warrant. That premise evaporates under State law, where the police officer applying for the search warrant is more experienced and more educated on warrant procedure than the district justice.

In *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991) the Pennsylvania Supreme Court confronted the question whether the good faith exception of *Leon* should be incorporated into Pennsylvania law. After reviewing the fundamental premise of the good faith exception under federal law and concluding that the premise was largely illusory under Pennsylvania practice and procedure, the court declined to adopt the good faith exception for Pennsylvania.

In *Edmunds* the court focused on several critical distinctions between federal and state practice. First, the

court noted that, "As the instant case illustrates, police officers and magistrates have historically worked closely together in this Commonwealth." *Id.*, 586 A.2d at 904. The Court held that given the particular nature of the working relationship between police officers and magistrates in Pennsylvania, the good faith exception did not adequately accommodate the danger that magistrates might become "rubber stamps". *Ibid.*

The record in this case, which will be reviewed, *infra*, provides a vivid illustration of the working relationship which troubled the court in *Edmunds*.

A further concern cited by *Edmunds* in rejecting the good faith exception was the danger of "magistrate shopping". *Ibid.* Under Pennsylvania law a search warrant application may be taken to any issuing authority in the county, whether or not the place to be searched is within the his or her magisterial district. Pennsylvania Rule of Criminal Procedure 2001. This gives law enforcement agents unfettered discretion to choose the district justice for review of a warrant application.

District Justice Scharding's magisterial district did not happen to include 930 Saw Mill Run Boulevard. Detective Bosetti testified that he had been instructed by his superior to take the warrant applications to District Justice Scharding, rather than to a city magistrate, because she had been selected by the state police to handle all warrants related to the video poker investigation. Bosetti therefore got into his car and drove twenty minutes to Scharding's office with the applications, although a city magistrate was right down the hall.

Under a directive from the Mayor of the City of Pittsburgh, Pittsburgh city magistrates must be lawyers.

During her testimony District Justice Scharding acknowledged her county-wide jurisdiction, but stated that in practice, she was usually called upon to exercise such

jurisdiction only when a city magistrate was not available. She said that it was "unusual" for a city detective to bring warrant applications to her office during regular business hours.

The warrant in question here was issued on September 23, 1988. The day before, as part of the same investigation, state and city officers presented over one hundred warrant applications to District Justice Scharding. A Pennsylvania State Police trooper appeard with over fifty applications in the morning; Detective Bosetti brought forty-nine more applications at lunchtime. Evidence seized pursuant to those warrants was later suppressed by the state court, based on the district justice's admission that she had not read all of the affidavits before signing the warrants.

District Justice Scharding testified before the district court that on September 22, 1988 one of the secretaries in her office called her at home to let her know that a state trooper had arrived with a large number of warrant applications. Without having seen any of the applications, the district justice instructed her secretary by phone to pick a time of issuance and put it on the warrants, next to the line for the issuing authority's signature. After the district justice's arrival at the office, police officers and office staff worked together to complete the applications and warrants. The secretaries affixed the district justice's stamp; and her official seal was affixed by a state trooper. She administered the oath to the affiant with reference the undifferentiated contents of a file box with a number of search warrants inside, asking simply whether "everything" was true.

District Justice Scharding testified that later that day she used the same procedure for Detective Bosetti's warrants. Detective Bosetti testified that the district justice's signature was already on the warrants at the time he signed his affirmaion.

When asked about her evaluation of the statement of probable cause in Detective Bosetti's affidavits on September 22, 1988, District Justice Scharding testified that the fact that the detective had sworn to the accuracy of he affidavit was enough to justify issuance of the warrants.

Regarding the September 22 warrants, the district justice testified that she had not read each and every page of each application, because she could see they were the same without reading them. The district justice further testified that, "I didn't think they needed that big long explanation", because she already knew what a gambling machine was. After the suppression order was filed in the state case, the district justice wrote a letter to the newspaper, complaining that she could hardly see why she should have to read the same pages a hundred times over.

All of this testimony was offered concerning issuance of related warrants on September 22, 1992, the day before issuance of the warrant for 930 Saw Mill Run Boulevard. The testimony is reviewed here, because it provides the context for Petitioners' contention that the premise of the *Leon* good faith exception is substantially weakened outside the area of federal practice.

This record demonstrates that the court's concerns in *Edmunds* regarding application of the good faith exception to Pennsylvania searches were well-taken. Under the law and practice of the forum, the fact that this warrant had the approval of the issuing authority is not deserving of the same deference that *Leon* provides for federal magistrates.

The central premise of *Leon* is that a federal agent should be entitled to rely on the judgment of a federal magistrate in approving a warrant for issuance and execution. Whether, and how, *Leon* should be applied when its fundamental premises evaporate in the less rarefied air of state procedure is a question that merits review by this Court.

CONCLUSION

For these reasons, the petition for writ of Certiorari should be granted.

Respectfully submitted,

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